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ARAB MALAYSIAN FINANCE BHD

v.

TAMAN IHSAN JAYA SDN BHD & ORS; KOPERASI SERI BUKIT CHERAKA BHD (THIRD PARTY)

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HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF J
[SUIT NO: D4-22A-67-2003]
10 NOVEMBER 2009

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CONTRACT: *Agreements - Terms and conditions of - Al Bai Bithaman Ajil Facility - Default in facility agreement - Whether a joint venture agreement entered between the defendant and a third party caused a novation of the BBA facility - Whether liability of guarantors remained*

D *enforceable*

Arab Malaysian Finance Berhad (the bank) had provided Al Bai Bithaman Ajil Facility (BBA Facility) to Taman Ihsan Jaya Sdn Bhd (TIJ Sdn Bhd). The terms of the BBA Facility was found in the Property Purchase Agreement (PPA) and the Property Sale Agreements (PSA). The purposes of the BBA Facility were to redeem two pieces of land from the existing charge, to finance business expansion and to provide for general investment purposes of TIJ Sdn Bhd. The second and third defendant executed a joint and several guarantee to guarantee the due observance and performance of the terms and conditions by TIJ Sdn Bhd. TIJ Sdn Bhd later entered into a joint venture agreement (the JV Agreement) with the third party, Koperasi Seri Bukit Cheraka Berhad (Koperasi) to develop the abovementioned land. It was one of the terms of the JV agreement in cl. 4.0 that the Koperasi agreed to pay the outstanding amount of RM5,132,840.37 owed by TIJ Sdn Bhd to the Bank. Subsequently, TIJ Sdn Bhd defaulted the facility agreement and the plaintiff sought a judgment and reliefs. The issue that arose was whether the JV Agreement entered between TIJ Sdn Bhd and the Koperasi had caused a novation of the BBA Facility Agreement and would thereby absolve the liability of TIJ Sdn Bhd.

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Held (allowing plaintiff's claim against the defendants):

(1) Before a novation can be said to have taken place, there must be the original contract and a new contract. The parties to the original contract must give their consent to the novation and

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there must be consideration. TIJ Sdn Bhd could only effect amendment to the agreements by complying strictly with the requirement of cl. 12.1 of the Property Sale Agreements. Any amendment, changes or alteration to the agreement must require written statement by the party against who such amendment was to be enforced. In this case, the alleged novation would affect the bank and thus a written statement from the bank was required under this clause. However, there was no written consent by the bank made under cl. 12.1 shown to this court. Hence, there was no novation by documents or conduct of the BBA Facility Agreement from TIJ Sdn Bhd to the Koperasi, either by the JV Agreement, or the exchange of letters between the bank and Koperasi. Consequently, the liability of the guarantors remained enforceable. TIJ Sdn Bhd was in default of the terms and conditions of the Al Bai Bithaman Ajil Facility and the Property Purchase Agreement. (paras 9, 11 & 17)

Case(s) referred to:

Chinn Swee Onn v. Puchong Realty Sdn Bhd [1989] 1 LNS 177 SC ***(refd)***

Government of Malaysia v. Adnan Awang & Ors [1980] 1 LNS 23 HC ***(refd)***

Hj Nik Ishak Hj Nik Daud v. Nik Zainab Nik Jaafar [1975] 1 LNS 53 FC ***(dist)***

LYL Hooker Sdn Bhd v. Tevanaigam Savishthri KT Chitty & Anor [1987] 1 CLJ 356; [1987] CLJ (Rep) 179 SC ***(refd)***

Malta Timber Products Sdn Bhd v. N & P Constructions Sdn Bhd [2003] 7 CLJ 569 HC ***(refd)***

Polygram Records v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor [1994] 3 CLJ 806 HC ***(refd)***

Scott & English (Malaysia) Sdn Bhd v. Foo Thor Lombong Bijih Sdn & Anor [1984] 1 LNS 61 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 42, 63

Rules of the High Court 1980, O. 14A

For the plaintiff - Dato Ahmad Redza Abdullah (Yau Her Lerk with him); M/s Shahrizat Rashid & Lee

For the defendant - Selvarajah (Nagaletchimy with him); M/s Fernandez & Selvarajah

Reported by Suhainah Wahiduddin

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JUDGMENT

Rohana Yusuf J:

[1] The background to the dispute between the parties may be summarized as follows. Abrar Finance Berhad with its assets and liabilities now vested in Arab Malaysian Finance Berhad (the Bank), provided Al Bai Bithaman Ajil Facility (BBA Facility) to Taman Ihsan Jaya Sdn Bhd (TIJ Sdn Bhd). The terms of the BBA Facility is found in the letter of offer in pp. 1 to 7 of CBOD as well as the Property Purchase Agreement (PPA) and the Property Sale Agreements (PSA) in pp. 8 to 55 of CBOD. The purposes of the BBA Facility are to redeem two pieces of land from the existing charge, to finance business expansion and to provide for general investment purposes of TIJ Sdn Bhd.

[2] The second and third defendant executed a joint and several guarantee in pp. 64 to 74 of CBOD to guarantee the due observance and performance of the terms and conditions by TIJ Sdn Bhd.

[3] TIJ Sdn Bhd later entered into a joint venture agreement (The JV Agreement) in p. 75 in CBOD with the third party, Koperasi Seri Bukit Cheraka Berhad (Koperasi) to develop the above mentioned land. It is one of the terms of JV Agreement in cl. 4.0 that the Koperasi agrees to pay the outstanding amount of RM5,132,840.37 owed by TIJ Sdn Bhd to the bank. Further to that JV Agreement, the bank did communicate with the Koperasi, witnessed by exchange of correspondences between them, as shown in p. 75 in CBOD. TIJ Sdn Bhd defaulted the facility agreement and the plaintiff is now seeking a judgment and the following reliefs:

(i) a judgment for a sum of RM5,134,193.71 being an outstanding amount as at 23 April 1999;

(ii) interest at 8% per annum for the above sum;

(iii) costs on client and solicitors basis;

(iv) costs in this suit.

[4] At the submission stage, the plaintiff withdrew its claim of interest in item (ii) above. Since there is no dispute of facts, by consent of parties, the plaintiff's case is pursued under O. 14A of the Rules of the High Court 1980 (RHC). It is to determine

essentially the issue of whether there is novation of the terms and conditions of the Al Bai Bithaman Ajil Facility or the PPA between the bank and TIJ Sdn Bhd, either by virtue of the JV Agreement or letters of communication or by conduct of parties. If there is novation of the terms TIJ Sdn Bhd is not liable to answer the claim of the bank and consequently, the second and the third defendant as guarantors will no longer be liable under the guarantee.

[5] I will first issue deal with is whether the JV Agreement entered between the TIJ Sdn Bhd and the Koperasi has caused a novation of the BBA Facility Agreement and would thereby absolve the liability of TIJ Sdn Bhd. The JV Agreement entered between TIJ Sdn Bhd and the Koperasi *inter alia* contains a clause that provides an undertaking by the Koperasi, to settle payment of RM5,132,840.37 due to Abrar Finance (the bank). That sum is the amount due to the bank and is the subject matter of the bank's present claim. The full text of the said cl. 4.0 of the JV Agreement is produced below in its original text:

> Pihak Kedua bersetuju menyelesaikan pembayaran yang tertangguh sebanyak RM5,132,840.37 (Ringgit Malaysia: Lima juta Satu Ratus Tiga Puluh dua Ribu Lapan Ratus Empat Puluh Dan Sen Tiga Puluh Tujuh sahaja kepada Abrar Finance Berhad mengikut peringkat-peringkat yang akan dicadangkan kemudian bagi pihak Pihak Pertama sebagai syarat utama di dalam perjanjian usahasama untuk projek berkenaan.

[6] Learned counsel for the defendants Encik S. Selvarajah and (Cik M. Nagaletchimy with him) contended that the above clause has caused a novation of the agreement between TIJ and the bank which absolved TIJ's liability to the bank under the BBA Facility Agreement. He cited in authority the case of *Hj Nik Ishak Hj Nik Daud v. Nik Zainab Nik Jaafar* [1975] 1 LNS 53; *Chinn Swee Onn v. Puchong Realty Sdn Bhd* [1989] 1 LNS 177. He further contended that the conduct of the parties particularly through exchange of correspondences between the bank and Koperasi following the JV Agreement amounted to consent by the bank to the novation and hence TIJ Sdn Bhd is no longer the right party to answer the claim of the bank.

[7] Learned counsel for the plaintiff Dato' Ahmad Redza Abdullah (Encik Yau Her Lerk with him) submitted that there can be no question of novation because the agreement between the bank and TIJ Sdn Bhd is not capable of being assigned and in fact there is no novation because under the BBA Facility Agreement the bank's consent is required before a novation can take place.

[8] The law on novation is in fact well settled. Abdul Malik Ishak J (now JCA) in *Malta Timber Products Sdn Bhd v. N&P Constructions Sdn Bhd* [2003] 7 CLJ 569 referred to the case of *LYL Hooker Sdn Bhd v. Tevanaigam Savishthri KT Chitty & Anor* [1987] 1 CLJ 356; [1987] CLJ (Rep) 179; [1987] 2 MLJ 52 at 53 states that a novation in fact, is a new contract where the rights and obligations under the old contract are extinguished by the new contract. In s. 63 of the Contracts Act 1950 it is provided that, if parties agree to substitute a new contract or to rescind the original contract, then the original contract need not be performed. Section 63 provided as follows:

> If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

[9] Visu Sinnadurai J (as he then was) in *Polygram Records v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor* [1994] 3 CLJ 806, explained the wide import of s. 63. He said the section is not limited in its scope to novation as it is understood under English Law alone, but also covers situations where the parties have rescinded the earlier contract, by substituting a new one. Thus, the test to employ is therefore, whether a new contract entered into by the parties actually extinguishes the old contract. It cannot therefore cover a situation where the terms of the old contract are merely altered or varied, without a new contract in substitution of it being entered into. In *Government of Malaysia v. Adnan Awang & Ors* [1980] 1 LNS 23; [1980] 2 MLJ 291 Wan Yahya J (as he then was) held that the party claiming such relief from the novation, must not only show the intention to novate but he must also prove that all the parties to the former contract have consented to the terms of the subsequent one. Thus in short before a novation can be said to have taken place, there must be the original contract and a new contract. The parties to the original contract must give their consent to the novation and there must be consideration.

[10] The defendants' assertion in the present case on there being a novation cannot be considered in isolation. It falls to be decided in the context of the agreements signed by the bank and the defendants particularly the PSA under which the first defendant's obligation to pay the sale price is derived. Following the submission of Dato' Ahmad Redza Abdullah for the bank, first, it is necessary to ascertain whether the liabilities under the original agreements are capable to be novated. In his submission Dato' Ahmad Redza

Abdullah drew the attention of this court to cl. 12.1 of the PSA. This clause deals with 'waiver and amendment'. It sets out the mode to be taken, to effect any waiver or amendment of the agreement. An amendment or variation is to take effect under the agreement only upon written consent by the Bank. The full text of the said cl. 1.21 is produced below for better appreciation:

> Section 12.1 Waiver and Amendments
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> ... Neither this Agreement nor any provision hereof may be amended, changed, modified, varied, waived, discharged or terminated orally, but only by a statement in writing signed by the party or parties against whom enforcement of the amendment, change, modification, variation, waiver, discharge or termination is sought.

[11] Clearly, TIJ Sdn Bhd being bound by this clause can only effect amendment to these agreements by complying strictly with the requirement of cl. 12.1 above. Any amendment, changes or alteration to the agreement must require written statement by the party against who such amendment is to be enforced. In this case, the alleged novation would affect the bank and thus a written statement from the bank is required under this clause. Clause 12.1 is further reinforced by cl. 12.3 when it disallow any assignment, or transfer of rights and obligations without prior written consent of the bank. Clause 12.3 is provided as follows:

> This Agreement shall be valid and binding upon and inure to the to the benefit of the Customer and the Financier and the respective successors, indorsees and assigns provided that the Customer may not assign or transfer its rights and obligations hereunder without the prior written consent of the Financier but the Customer shall nevertheless remain liable for all its obligations hereunder in the event of any non disclosure of any material fact pertaining to the Customer's assignment which if disclosed would affect the Financier's decision to agree to such assignment.

Undoubtedly a novation may be possible in this case only with the express consent in writing by the bank.

[12] There is no written consent by the bank made under cl. 12.1 shown to this court. Clause 4.0 of the JV Agreement cannot amount to a consent by the bank because JV Agreement is an agreement between TIJ Sdn Bhd and the defendant. It cannot infer any consent by the bank despite undertaking by Koperasi because

A the bank is not privy to that undertaking. The undertaking if at all is made directly to TIJ Sdn Bhd who is a party to the JV Agreement.

[13] The counsel for the defendant further contended that the B exchange of communication between Koperasi and the bank and the conduct of the bank in that communication would tantamount to consent to the alleged novation. The exchange of communication relied on by the defendants are letters issued by the bank to Koperasi requesting for some details on the Project. There are three C letters relied upon by the defendants. In p. 87 of CBOD, the bank made a request for the Koperasi to open a single Project account with the inclusion of representative of the bank as signatories. Page 96 is a letter from the bank requesting detailed particulars of the development. The letter at p. 97 is a reminder to Koperasi on D the required detail, whilst the letter at p. 99 is an information on the revised redemption sum of phase I. They are letters that cannot in any way tantamount to be consent required under cl. 12.1. I agree with Dato Ahmad Redza Abdullah's submission that at best these letters imply knowledge of the bank that there was E development arrangement and the fact that Koperasi is requested to pay to bank from the proceed of the Project.

[14] Even in the authorities cited by counsel for defendant the case of *Hj Nik Ishak Hj Nik Daud v. Nik Zainab Nik Jaafar* [1975] F 1 LNS 53, consent is required before a novation can take effect. In that case the respondent had transferred his land to the appellant for $25,000 and $14,000 respectively. There was a balance of $11,000 due from the respondent to the appellant. The respondent's son agreed to pay the amount but did not do so. The appellant G then sued the respondent for the sum. The Federal Court held that as the appellant had agreed to accept the offer to settle the amount by the respondent's son, he was precluded from enforcing it against the respondent. The facts of the present case are easily distinguished. In *Haji Nik Ishak* there was a specific representation H made by the third party to the appellant. The respondent's son told the appellant that he would discharge the respondent's obligation, the offer of which was accepted by the appellant. In the present case, there was no agreement to accept the Koperasi's undertaking by the bank. Furthermore cl. 12.3 referred to earlier does not allow I alteration to the term without prior written consent of the bank. The clause went further in fact, to say that the customer shall

nevertheless remain liable for its all obligation in the event of any non disclosure of any material fact pertaining to any assignment. To this end the Supreme Court of *Housing Development Board v. Lee Sen Yoong Sdn Bhd* cited by Dato' Ahmad Redza Abdullah supports the contention that consent of all three parties are required.

[15] Encik S Selvarajah also attempted to invoke s. 42 of the Contracts Act. s. 42 provides that:

> When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Based on this section he contended that the bank should not pursue the claim against TIJ Sdn Bhd any longer, when it accepted the agreement of the Koperasi. Reading it plainly it is clear that in order to invoke s. 42 of the Contracts Act, an agreement must have been achieved between the promisee and the promisor and there must have been complete performance by the third party. This is clearly stated and applied in *Scott & English (Malaysia) Sdn Bhd v. Foo Thor Lombong Bijih Sdn & Anor* [1984] 1 LNS 61 where it was held that s. 42 only applies when a contract has in fact been performed by the third person.

[16] In another case referred by the learned counsel for the defendant, *Chin Swee Onn v. Puchong Realty Sdn Bhd* [1989] 1 LNS 177, the facts showed that the judgment creditor had clearly agreed to forebear to levy execution on the judgment against the debtor who had instructed a third party to pay the judgment debt by a monthly sum of RM2,000 until the decretal sums have been settled. There was clearly a settlement agreement and so the Supreme Court invokes s. 42. Contrary to that position, in our case the agreement was only entered into by the first defendant and the third party without the written consent of the plaintiff. No proof of payment had been made by Koperasi in order to absolve the liability of TIJ Sdn Bhd, under s. 42 of the Contracts Act.

[17] Having regards to the respective submissions and in the light of the foregoing reasons, my answers to the question posed is that there is no novation by documents or conduct of the BBA Facility Agreement from the TIJ Sdn Bhd to the Koperasi, either by the JV Agreement, or the exchange of letters between the bank and Koperasi. Consequently the liability of the guarantors remains enforceable.

A **[18]** Following that, I find that TIJ Sdn Bhd is in default of the terms and conditions of the Al Bai Bithaman Ajil Facility dated 27 March 1996 and the property purchase agreement dated 24 April 1996. Hence the plaintiff's claim against the defendants is allowed with costs.

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